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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 35/2020 concerning Jamal Talib Abdulhussein (Australia)*, **

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 24 October 2019 the Working Group transmitted to the Government of Australia a communication concerning Jamal Talib Abdulhussein. The Government replied to the communication on 24 December 2019. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

* In accordance with paragraph 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.

** The partially dissenting opinion of José Guevara Bermúdez and Seong-Phil Hong is contained in the annex to the present opinion.

disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Jamal Talib Abdulhussein, born in 1958, is an Iraqi national. On 15 December 2012, Mr. Abdulhussein was detained on Christmas Island. Mr. Abdulhussein came to Australia by boat to seek asylum, accompanied by his two minor children. The authorities from the Department of Home Affairs, which carried out the arrest, showed a detention notification.

5. The reason for the arrest, provided by the Australian authorities, was the Migration Act 1958, which states in its section 189 (1) and section 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. As an "unlawful non-citizen", Mr. Abdulhussein was automatically detained and placed in administrative detention.

6. The source specifies that Mr. Abdulhussein had already been the subject of administrative detention between 11 December 1999 and May 2000. On 11 December 1999, Mr. Abdulhussein arrived by boat in Darwin, seeking asylum from persecuting forces in Iraq, and was subsequently detained at Curtain Detention Centre. On 24 May 2000, Mr. Abdulhussein was granted asylum and a temporary protection visa. In 2000, Mr. Abdulhussein worked as a security guard during the Olympic Games. Between 2002 and 2003, he applied for his family to come to Australia.

7. In January 2003, Mr. Abdulhussein was charged with three counts of having a false instrument relating to an intent to use fraudulently obtained credit cards. He was sentenced to 12 months of imprisonment and lodged a severity appeal. In August 2003, Mr. Abdulhussein was charged with common assault, driving with high blood alcohol, driving with a licence that had expired less than two years ago, and breaking and entering a building. In October 2003, he was convicted in absentia for these offences.

8. On 20 November 2003, while on bail, Mr. Abdulhussein left Australia and returned to Iraq using a friend's passport. On 30 November 2003, he arrived in Iraq. Reportedly, Mr. Abdulhussein left Australia as he missed his family and considered it safe to return home to care for them. On his arrival back in Iraq, Mr. Abdulhussein discovered that his spouse had divorced him in his absence. Mr. Abdulhussein later remarried.

9. In May 2009, Mr. Abdulhussein and one of his children from his first marriage were assaulted and kidnapped in Iraq. Mr. Abdulhussein then fled to Turkey with his five children, where on 20 July 2009 the Office of the United Nations High Commissioner for Refugees (UNHCR) found them to be refugees. The source understands that in late 2009, the United States of America offered to resettle the family. Given, however, that the mother of the older children had separately and previously been resettled in Australia as a refugee, the older children asked Mr. Abdulhussein to wait for Australia to accept them. As such, the source informs the Working Group that UNHCR applied to Australia to take the family.

10. In 2012, Mr. Abdulhussein decided that they had waited long enough for a response from Australia. In the interim, the children from the first marriage were granted asylum in Australia and were flown there. On 14 December 2012, Mr. Abdulhussein arrived in Australia with his two youngest children. On this occasion, he used his own Iraqi passport. On 15 December 2012, Mr. Abdulhussein and his two children were detained on Christmas Island.

11. The source further reports that on 23 July 2015, following an incident in immigration detention, Mr. Abdulhussein's youngest children were transferred to community detention, to a care home, where they remain to date. Mr. Abdulhussein remains in closed detention.

12. Moreover, on 18 August 2015, Mr. Abdulhussein's criminal sentence was varied to reflect that he had served a custodial sentence from 15 August 2014 until 14 August 2015 while in immigration detention. Reportedly, this means that the time that he has spent in administrative detention has been taken into account by the court to satisfy his prison sentence. As such, if and when he is released from detention, he will not be arrested and taken to prison.

13. On 14 June 2016, the Minister for Home Affairs invited the family to apply for protection visas. Consequently, on 13 October 2016, Mr. Abdulhussein lodged a protection visa application, with his minor children listed as dependants. On 22 March 2017, the family's protection visa application was refused by the Department of Home Affairs and was automatically referred to the Immigration Assessment Authority.

14. On 13 April 2017, submissions were made to the Immigration Assessment Authority on behalf of the family. On 10 May 2017, this authority found that Mr. Abdulhussein and his children were owed protection obligations, and remitted the decision to the Department of Home Affairs. On 21 June 2017, the Department of Home Affairs issued Mr. Abdulhussein with a notice of intention to consider visa refusal. Mr. Abdulhussein made submissions in response to this notice on 14 August 2017.

15. On 19 December 2017, Mr. Abdulhussein's children were granted temporary protection visas, and on 7 March 2018, the Department of Home Affairs issued Mr. Abdulhussein with a request for further information regarding the notice. Submissions were made in response to this request on 3 April 2018. On 13 July 2018, the Department provided Mr. Abdulhussein with a temporary protection renewal notification for his children, as their visas are due to expire at the end of 2020.

16. Furthermore, reportedly, on 31 August 2018, the Department of Home Affairs rejected Mr. Abdulhussein's visa application, which he appealed to the Administrative Appeals Tribunal. On 23 November 2018, the Tribunal found in favour of Mr. Abdulhussein and remitted the matter back to the Department. On 1 March 2019, the Department issued Mr. Abdulhussein with a notice of intention to refuse his visa application. On 25 March 2019, submissions were made in response to that notice of intention.

17. On 19 June 2019, Mr. Abdulhussein filed a claim in the Federal Court for unreasonable delay by the Department in making a decision on his visa application. On 12 July 2019, the Minister personally set aside the decision of the Administrative Appeals Tribunal and refused to grant Mr. Abdulhussein a visa. Mr. Abdulhussein has appealed to the Federal Court. The Federal Court hearing date regarding Mr. Abdulhussein's visa rejection was set for 30 September 2019 and then postponed until 19 November 2019.

18. The most recent decision of the Minister to personally deny Mr. Abdulhussein a visa by setting aside the Administrative Appeals Tribunal's decision is based on the Minister's assessment that Mr. Abdulhussein does not pass the character test and that granting him a visa is not in the national interest. The source notes that in discussing Mr. Abdulhussein's behaviour, the Minister referred to Mr. Abdulhussein's engagement with people smugglers. According to the source, this suggests that the Minister believes there are similarities between seeking asylum and criminal behaviour.

19. The source concludes that Mr. Abdulhussein has been found to be owed protection obligations and be a refugee four times, including three times by Australian institutions. It notes that the detention of Mr. Abdulhussein amounted to over six years.

20. The source submits that given the decision of the High Court of Australia which upheld the view that mandatory detention of non-citizens was not contrary to the Constitution of Australia,[1] Mr. Abdulhussein lacks any chance of his detention being the subject of real judicial review. The source further notes that the Human Rights Committee has determined that there is no effective remedy or people subject to mandatory detention in Australia.[2]

21. The source further submits that Mr. Abdulhussein has been deprived of liberty as a result of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights. It also notes that the detention does not meet international norms relating to the right to a fair trial, given that Mr. Abdulhussein is not being criminally detained, and the Minister had been given direction by both the Administrative Appeals Tribunal and the

[1] *Al-Kateb v. Godwin*, *Commonwealth Law Reports*, vol. 219 (2004), p. 562; case also available at https://jade.io/article/68483?at.hl=al-kateb.

[2] *C. v. Australia* (CCPR/C/76/D/900/1999).

Immigration Assessment Authority that Mr. Abdulhussein meets the criteria for the granting of a visa.

22. Moreover, the source submits that Mr. Abdulhussein, as an asylum seeker who is being subjected to administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy.

23. Furthermore, it is submitted that the Minister has stated Mr. Abdulhussein will not be allowed to make another visa application unless the refusal decision is set aside or Mr. Abdulhussein is invited by the Minister to apply for a Bridging R (Class WR) visa under subsection 501E (2) of the Act. The source regards this as unlikely. The source states that the Minister also noted that the refusal decision could not be reviewed by the Administrative Appeals Tribunal, as the review decision had been made by the Minister personally.

24. The source informs the Working Group that the Minister has issued instructions to the Department of Home Affairs that all controversial cases, such as that of Mr. Abdulhussein, are to be referred to him for decision. The source submits that it is very unlikely that the Minister has asked for these cases to be referred to him for these people to be considered for release. This, according to the source, raises questions regarding actual or perceived biases and procedural fairness. The source notes that a freedom of information request for the instruction has been made and the response is still pending.

25. According to the source, Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The decision of the High Court of Australia in *Al-Kateb v. Godwin* stands for the proposition that the detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act does not contravene the Constitution of Australia. The effective result of this decision is that while Australian citizens can challenge administrative detention, non-citizens cannot.

26. The source further notes that while Mr. Abdulhussein has not exhausted all domestic remedies, even if he is successful in the Federal Court, the decision to grant him a visa will be remitted to the Department of Home Affairs and/or the Minister. Given that the Department and Minister have refused Mr. Abdulhussein's visa application three times, the source considers it unlikely that Mr. Abdulhussein will be granted a visa. As such, he will likely remain in indefinite detention. The source again emphasizes that section 196 (3) of the Migration Act specifically provides that "even a court" cannot release an unlawful non-citizen unless the person has been granted a visa.

27. The source concludes that the detention of Mr. Abdulhussein falls under categories I, II, III, IV and V of the Working Group.

Response from the Government

28. On 24 October 2019, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 23 December 2019, detailed information about the current situation of Mr. Abdulhussein, and to clarify the legal provisions justifying his continued detention, as well as the compatibility of his detention with the obligations of Australia under international human rights law, particularly with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Australia to ensure the physical and mental integrity of Mr. Abdulhussein.

29. On 9 December 2019, the Government requested an extension in accordance with paragraph 16 of the Working Group's methods of work, which was granted, with the new deadline being set for 23 January 2020.

30. The Government submitted its reply on 24 December 2019, in which it argues that the Government, through the Department of Home Affairs, is considering Mr. Abdulhussein's case in accordance with the ministerial intervention guidelines made for the purposes of section 195A of the Migration Act 1958. Section 195A of that Act enables the Minister to grant a visa to a person in immigration detention, if the Minister considers that it is in the public interest to do so. In addition, section 197AB of the Act provides the Minister with the power to make a residence determination in respect of a person in immigration detention, allowing him or her to reside in the community at a specified place

and under specified conditions, if the Minister considers that it is in the public interest to do so.

31. The Government explains that in Mr. Abdulhussein's circumstances, he can only be granted a visa or placed into the community by a Minister exercising his or her personal intervention powers. The Minister's powers are non-compellable, meaning that the Minister is under no obligation to exercise or to consider exercising these powers. What is in the public interest is a matter for the Minister to determine. If Mr. Abdulhussein's case is found to meet the guidelines for referral, it will be referred to the Minister for consideration.

32. On 26 November 2019, the Federal Court set aside the Minister's 12 July 2019 decision to set aside the Administrative Appeals Tribunal decision and refuse to grant Mr. Abdulhussein a temporary (subclass 785) protection visa under section 501A of the Migration Act. As a result, the Administrative Appeals Tribunal's decision stands and Mr. Abdulhussein's application for a temporary protection visa has been remitted to the Department for reconsideration, which remains ongoing. Mr. Abdulhussein remains in immigration detention as an unlawful non-citizen without a valid visa.

33. On 11 October 1999, Mr. Abdulhussein first arrived in Australia as an unauthorized maritime arrival, using the alias Jamal Al Ghariri. He was detained under section 189 of the Act and transferred to an immigration detention centre. On 24 May 2000, he was granted a temporary protection visa and released from immigration detention. On 26 May 2000, he lodged an application for a protection visa (subclass 866).

34. On 7 January 2003, Mr. Abdulhussein was charged with fraud-related offences. On 22 May 2003, he was convicted on three counts of having a false instrument with the intent to use, and was sentenced to 12 months' imprisonment. On 16 May 2003, Mr. Abdulhussein's temporary protection visa expired, and on the same day his Bridging A (subclass 010) visa, granted in association with his protection visa application, came into effect.

35. Mr. Abdulhussein departed Australia in 2004, using a friend's New Zealand passport. The Government understands that around this time, the New South Wales police had issued warrants for his arrest in relation to further offences alleged to have been committed by Mr. Abdulhussein.

36. On 16 March 2005, Mr. Abdulhussein was found not to engage the protection obligations of Australia and a delegate of the Minister refused to grant him a protection visa. On 15 December 2012, Mr. Abdulhussein arrived in Australia again as an unauthorized maritime arrival with two of his sons, using the alias Jamal Talib Abdul Hussein Al Ghariri. He was detained under section 189 (3) of the Migration Act and transferred to an immigration detention centre. On 10 January 2013, during an entry interview, he stated that he had lived in Australia for four years from 10 November 1999. A fingerprint analysis confirmed Mr. Al Ghariri to be Mr. Abdulhussein.

37. In February 2015, Mr. Abdulhussein's case was referred to the then Minister for consideration under section 197AB of the Act. The submission included his two children. On 16 February 2015, the then Minister chose not to consider the case under section 197AB of the Act.

38. On 30 June 2015, Mr. Abdulhussein requested voluntary removal for himself and his two sons. On 15 July 2015, Mr. Abdulhussein withdrew his request. On 14 August 2015, Mr. Abdulhussein was taken from immigration detention into criminal custody in relation to the outstanding warrants for his arrest from his first period of time in Australia. On 21 August 2015, he was located at Fairfield Police Station, bailed, detained under section 189 (1) of the Act and transferred to an immigration detention centre.

39. On 27 August 2015, Mr. Abdulhussein was convicted of offences including common assault, breaking and entering a building, destroying or damaging property (three counts), failure to appear in accordance with a bail undertaking, and driving-related offences for which he was fined and disqualified from driving and had an 18-month good behaviour bond imposed on him.

40. On 29 September 2015, the Minister lifted the bar under section 46A of the Migration Act to allow Mr. Abdulhussein and his family to make a valid application for a visa. Section 46A is a statutory bar which precludes an unauthorized maritime arrival who

is either an unlawful non-citizen or the holder of a bridging visa or temporary protection visa from making a valid visa application.

41. On 1 July 2016, Mr. Abdulhussein withdrew his request for voluntary removal for himself and his sons. On 13 October 2016, he lodged an application for a temporary protection visa, with his two sons listed as dependant applicants.

42. On 22 March 2017, Mr. Abdulhussein was found not to engage the protection obligations of Australia and a delegate of the then Minister refused to grant Mr. Abdulhussein and his two children temporary protection visas. On 10 May 2017, following a review, the Immigration Assessment Authority remitted the application to the Department with a direction that there were substantial grounds for believing that if removed, the family would be subject to a real risk of harm upon their return to Iraq.

43. On 22 June 2017, Mr. Abdulhussein was issued a Notice of Intention to Consider Refusal of his temporary protection visa, under section 501 of the Migration Act. Mr. Abdulhussein responded to the notice on 14 August 2017. On 22 August 2017, Mr. Abdulhussein again requested voluntary removal for himself and his sons. The Department began progressing their voluntary removal.

44. On 19 December 2017, Mr. Abdulhussein's children were granted temporary protection visas. On 31 August 2018, a delegate of the Minister refused to grant Mr. Abdulhussein a temporary protection visa under section 501 (1) of the Migration Act, on the basis of his substantial criminal record.

45. On 9 October 2018, Mr. Abdulhussein sought a merits review of the refusal decision, at the Administrative Appeals Tribunal. On 23 November 2018, the Administrative Appeals Tribunal set aside the delegate's decision, remitting the matter back to the Department for reconsideration with a direction that discretionary factors be exercised in the applicant's favour so that he would be granted a visa.

46. On 14 February 2019, Mr. Abdulhussein's case was included on a submission referred to the Assistant Minister, on which it was noted that an indication was being sought from Mr. Abdulhussein as to whether he would like to consider ministerial intervention options. On 26 February 2019, the Assistant Minister indicated that Mr. Abdulhussein's case should not be referred for consideration under the ministerial intervention powers.

47. On 1 March 2019, Mr. Abdulhussein was issued with a Notice of Intention to Consider Refusal in connection with the considered exercise of the Minister's personal power under section 501A (2) of the Act. The Minister's personal power under section 501A of the Act to set aside an Administrative Appeals Tribunal decision and refuse a visa in the national interest is non-delegable. Such decisions can only be made by the Minister.

48. On 28 March 2019, the Department received a response to the Notice of Intention to Consider Refusal. On 12 July 2019, the Minister decided to set aside the Administrative Appeals Tribunal's decision and refuse Mr. Abdulhussein a temporary protection visa under section 501A (2) of the Act.

49. On 17 July 2019, the Department initiated a further assessment of Mr. Abdulhussein's case under the ministerial intervention guidelines relating to section 195A of the Migration Act. The assessment is in progress.

50. Mr. Abdulhussein's health and welfare are monitored by International Health and Medical Services (IHMS) General Practitioners and Psychiatrists. IHMS continue to support Mr. Abdulhussein with his physical and mental health care. All detainees are made aware of the health referral system.

51. The Government explains that Australia's universal visa system requires all non-citizens to hold a valid visa. The immigration detention legislative framework provides that under the Migration Act, an unlawful non-citizen must be detained where it is known or reasonably suspected that an individual is an unlawful non-citizen. An unlawful non-citizen must remain in immigration detention until removed from Australia or granted a visa.

52. In order to be granted a visa, all visa applicants must meet certain criteria, including the character requirements under section 501 of the Migration Act. Section 501 allows the Minister, or a delegate, to refuse to grant a visa to a non-citizen where the non-citizen does

not satisfy the Minister that they pass the character test; or to cancel a visa where the Minister reasonably suspects that the person does not pass the character test and the person is not able to satisfy the Minister that they do. There are a number of grounds on which a person may not pass the character test, including, but not limited to, where there is a risk that the non-citizen would engage in criminal conduct in Australia or represent a danger to the Australian community or a segment of it.

53. When a decision is made either to refuse to grant or to cancel a visa, all relevant information and circumstances relating to the case, including the impact on the individual, are taken into account. However, the safety of the Australian public remains the primary consideration and a decision to refuse to grant or to cancel a visa may be made because a non-citizen represents a danger to the community, even where there are countervailing factors. Cases under consideration for character are allocated to a decision maker according to the seriousness and nature of adverse conduct.

54. The Minister has the personal power, under section 501A of the Migration Act, to set aside a decision of the Administrative Appeals Tribunal and to substitute it with a decision to refuse to grant or to cancel a visa, if the person does not satisfy the Minister that the person passes the character test and the Minister is satisfied that the decision is in the national interest. The Department may refer cases to the Minister where the Administrative Appeals Tribunal has set aside decisions made under section 501 of the Act, to ascertain whether the Minister wishes to consider exercising his or her personal powers to set aside the Administrative Appeals Tribunal's decision under section 501A of the Act.

55. The position of the Government of Australia is that the detention of an individual on the basis that they are an unlawful non-citizen is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens.

56. The Government argues that the immigration detention is administrative and not punitive in nature. It reiterates its commitment to ensuring that all detainees are treated in a manner consistent with the international legal obligations of Australia. Mr. Abdulhussein's immigration detention is due to his being an unlawful non-citizen without a valid visa, and not by reason of his intention to seek protection in accordance with the international obligations of Australia.

57. In relation to review mechanisms, the Government notes that in accordance with section 486N of the Migration Act, the Commonwealth Ombudsman is provided with a report relating to the circumstances of a person's detention, for every person who has been in administrative immigration detention for more than two years, and every six months thereafter. The Ombudsman will, as required, report to the Minister, providing an assessment of the appropriateness of the arrangements for the detention of the person.

58. Accordingly, the Government consults with relevant stakeholders on a regular basis to review Mr. Abdulhussein's placement and detention. Mr. Abdulhussein's detention has been reviewed 71 times by Case Management and Detention Review Committee meetings within the Department of Home Affairs. The first review was conducted on 20 February 2013 and the most recent review was conducted on 14 November 2019. Each review to date has found that Mr. Abdulhussein's detention continues to be appropriate and his current placement continues to be suitable, noting that only a Minister has the power to grant a visa to Mr. Abdulhussein or to place him into the community, and that this has not occurred in his case. There is currently a referral for ministerial intervention for Mr. Abdulhussein, however his case will be considered against guidelines for referral.

59. A person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court of Australia or the High Court of Australia. Paragraph 75 (v) of the Constitution of Australia provides that the High Court has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth of Australia. Subsection 39B (1) of the Judiciary Act 1901 grants the Federal Court the same jurisdiction as the High Court under paragraph 75 (v) of the Constitution. It is these provisions that constitute the legal mechanism through which a non-citizen may challenge the lawfulness of their detention, that is, challenge the legal application of section 189 of the Migration Act. This right to

seek a remedy against an officer of the Commonwealth of Australia under the Constitution or in the Federal Court is available to Australian citizens and non-citizens alike.

60. The Government further notes that the decision in *Al-Kateb* does not alter a non-citizen's ability to challenge the lawfulness of their detention under Australian law. The right to seek a remedy against an officer of the Commonwealth of Australia under the Constitution is still available to non-citizens.

61. Australia's universal visa system involves a binary system of lawful and unlawful non-citizens. In order to be a "lawful non-citizen", a non-citizen must hold a valid visa. A non-citizen in Australia who does not hold a visa that is in effect is an unlawful non-citizen (see sections 13 and 14 of the Migration Act). Subsection 189 (1) of the Act obliges officers to detain a person that they know or reasonably suspect is an unlawful non-citizen.

62. Nothing in the Migration Act, including its section 196 (3), prevents the court from determining and enforcing the limitation in section 189 (1).[3] It is thus open to immigration detainees to approach the court to challenge their detention on the basis that the requisite knowledge or reasonable suspicion does not exist. That can be on the basis that the person concerned in fact holds a visa that is in effect and is a lawful non-citizen, or is an Australian citizen and not a non-citizen at all. If the court agrees, it can order that a person be released from immigration detention. Subsection 196 (3) does not prevent this, because the person in question is necessarily either a lawful non-citizen or not a non-citizen at all.

63. This right to approach the court is guaranteed under section 75 of the Constitution. The section similarly guarantees judicial review rights in relation to all visa decisions under the Migration Act. The Government submits that contrary to the source's submissions, Mr. Abdulhussein is guaranteed the possibility of judicial review.

64. Furthermore, the Government states that Mr. Abdulhussein is able to seek and has sought merits and judicial reviews of the migration decisions made in respect of him. The Immigration Assessment Authority and the Administrative Appeals Tribunal both reviewed decisions to refuse to grant Mr. Abdulhussein a temporary protection visa, on two separate occasions (10 May 2017 and 23 November 2018 respectively). On 13 June 2019, Mr. Abdulhussein commenced a judicial review with the Federal Court. On 26 November 2019, the Federal Court set aside the Minister's decision of 12 July 2019.

65. The Government notes that, according to the source, Mr. Abdulhussein has been deprived of liberty as a result of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights. It nevertheless states that Mr. Abdulhussein is being detained as required under section 189 of the Migration Act as he is an unlawful non-citizen. It is the Government's view that Mr. Abdulhussein is being detained as a consequence of the operation of the domestic laws of Australia, not as a consequence of seeking protection in accordance with the country's international obligations.

66. The Government notes that the object of the Migration Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". The purpose of the Act is to differentiate on the basis of nationality between non-citizens and citizens. The Human Rights Committee has recognized in the context of the International Covenant on Civil and Political Rights that: "The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment." (See the Committee's general comment No. 15 (1986) on the position of aliens under the Covenant).

67. The Government underlines its prerogative to determine who may enter its territory and under what conditions, including by requiring that a non-citizen hold a visa; in circumstances where a visa is not held, a non-citizen is subject to immigration detention. Thus, to the extent that there is differential treatment of citizens and non-citizens in that citizens are not subject to immigration detention, the Government's view is that this

[3] *Plaintiff SI 64/2018 v. Minister for Home Affairs* (2018), High Court of Australia transcript 172.

differential treatment is based on reasonable and objective criteria for a legitimate purpose and therefore does not amount to prohibited discrimination under the International Covenant on Civil and Political Rights.

Reply from the source

68. The reply of the Government was transmitted to the source on 2 January 2020 for further comments, which the source submitted on 6 January 2020. In its reply, the source notes that the Government does not accurately interpret the law regarding the remittal of Mr. Abdulhussein's case from the Federal Court to the Department of Home Affairs, for the latter to remake the decision according to law. While the response of the Government of Australia notes that the relevant ministers can remake the decision, it is also permissible for a delegate to make a decision. The result of the Federal Court matter is that the Administrative Appeals Tribunal decision is re-enlivened. It is therefore possible for a delegate of the ministers to make a decision.

69. The source argues that if a delegate is to make such a decision, then under the Migration Act, Mr. Abdulhussein must be granted a visa. It is only ministers who can refuse to grant Mr. Abdulhussein a visa. The source thus claims that the fact that the government response does not appear to consider this delegation implies either a misunderstanding of law or a bias. The source concludes that, either way, the basis for potential court action is formed.

70. The source further notes that the government response claims that the Department is considering Mr. Abdulhussein's case against the ministerial guidelines for the purposes of sections 195A and 195AB of the Migration Act. This implies that there is some action taking place in the processing of Mr. Abdulhussein's protection visa application. The source states that this is misleading. Mr. Abdulhussein's visa application is not before the ministers, instead it is with the Department for assessment against guidelines to potentially send to the ministers for consideration.

71. The source submits that it is inaccurate to suggest that, after having refused Mr. Abdulhussein a visa multiple times, the Department will now assess whether Mr. Abdulhussein meets the guidelines for referral to the ministers, and that the ministers will then decide to grant Mr. Abdulhussein a visa. This is all the more so considering that such referral occurred only five days after the Minister set aside the tribunal decision, and no action has been taken to date – more than seven months after the initial referral.

72. The source argues that this appears to be merely a tactic used by the Department to give the impression that it remains engaged with Mr. Abdulhussein's matter, instead of pursuing a constructive refoulement approach by ensuring that Mr. Abdulhussein remains in detention or "agrees" to return to Iraq.

73. The source also states that the Government's assertion that detention in an immigration detention centre is a last resort for the management of unlawful non-citizens is not correct. The source claims that detention is the first resort for unlawful non-citizens. Under section 189 of the Migration Act, unlawful non-citizens must be detained.

74. The source also refers to the governmental response in relation to detention review mechanisms. The source submits that these mechanisms operate within the legal framework of Australia which permits arbitrary detention.

75. Furthermore, the source notes the Government's claim that the Commonwealth Ombudsman has no power to compel the Department to release a person from immigration detention. The source states that indeed, the Department has consistently failed to act on recommendations of the Ombudsman to release individual asylum seekers and refugees from detention.

76. The source claims that the *Al-Kateb* case reinforces the position of Mr. Abdulhussein: his arbitrary open-ended detention is authorized by law, through both legislation and the case law. The source further notes that the review mechanisms available to Mr. Abdulhussein relate to the decision-making process concerning granting of a visa, rather than to Mr. Abdulhussein's detention. Finally, the source submits that but for coming to Australia to seek asylum, Mr. Abdulhussein would not be an unlawful non-citizen and would not be liable for detention.

Discussion

77. The Working Group thanks the Government and the source for their timely submissions. The Working Group recalls that in determining whether Mr. Abdulhussein's detention is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

78. Noting that the source has submitted that the detention of Mr. Abdulhussein falls under categories I, II, III, IV and V, allegations denied by the Government, the Working Group shall proceed to examine the submissions under each of the categories, in turn.

79. Before proceeding, the Working Group wishes to make an initial observation that many of the submissions made discuss whether the decisions concerning Mr. Abdulhussein's applications for asylum were well founded and whether the decisions of the Minister for Home Affairs not to release Mr. Abdulhussein were justified. The Working Group recalls that its mandate does not cover the substantive issue of whether Mr. Abdulhussein should be granted asylum or refugee status.[4] Equally, the question of whether the Minister for Home Affairs has acted within his powers or not is first and foremost one for the domestic courts to consider. The Working Group reiterates that it has consistently refrained from taking the place of national judicial authorities or acting as a kind of supranational tribunal, when it is urged to review the application of domestic law by the judiciary[5] or other domestic bodies.

80. As the Working Group has previously stated, a deprivation of liberty falls under category I as lacking a legal basis not only if there is no law authorizing such deprivation of liberty but also if the authorities fail to invoke such legal basis through, for example, an arrest warrant or a detention notice.[6] It is not disputed that Mr. Abdulhussein was detained on 15 December 2012 following his arrival on Christmas Island. It is also not disputed that the Migration Act 1958 was the legal basis for his detention and that authorities from the Department of Home Affairs, which carried out the arrest, showed a detention notification.

81. Notwithstanding the serious reservations that the Working Group has about the Migration Act 1958, it cannot find that the detention of Mr. Abdulhussein was not carried out in accordance with this Act, and therefore is unable to find that detention falls under category I.

82. Turning to the submission that the detention of Mr. Abdulhussein falls under category II, the Working Group notes that the source claims that Mr. Abdulhussein was detained due to his migratory status, a claim which is not denied by the Government.

83. However, the Working Group must observe that Mr. Abdulhussein had previously legally lived in Australia and had a valid visa until he fled the jurisdiction. When he attempted to re-enter Australia in December 2012, he was travelling under an alias and his true identity was not established until the entry interview on 10 January 2013. It is only from that time that the authorities were able to establish a number of outstanding claims in relation to Mr. Abdulhussein, including outstanding prison sentences.

84. The Working Group has always maintained that seeking asylum is not a criminal act but a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights, and in the Convention relating to the Status of Refugees, of 1951, and its 1967 Protocol. The Working Group notes that these instruments constitute international legal obligations that Australia has undertaken.[7]

85. As the Working Group stated in its revised deliberation No. 5:

[4] Opinion No. 74/2017, para. 56.
[5] Opinions Nos. 40/2005, 15/2017, 16/2017, 30/2017, 58/2017 and 49/2019.
[6] Opinions Nos. 46/2017, 66/2017, 75/2017, 35/2018 and 79/2018.
[7] Opinions Nos. 28/2017 and 42/2017.

> Any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.[8]

86. Mr. Abdulhussein was not truthful about his identity when he arrived on Christmas Island in December 2012, which may have served as a justification for his initial detention. Moreover, he had previously fled Australia and had outstanding prison sentences. In the light of these facts, which are not disputed by the source, the Working Group is unable to conclude that the initial detention of Mr. Abdulhussein was purely due to his exercise of the right to seek asylum. The Working Group is therefore unable to find that the detention of Mr. Abdulhussein falls under category II.

87. However, Mr. Abdulhussein has been in detention for over eight years, since 15 December 2012. Although for approximately a year of that time Mr. Abdulhussein served an outstanding prison sentence, the remainder of the time he has been detained purely due to his migratory status. It is therefore upon the Working Group to examine whether this detention falls under its category IV, which may arise if asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.

88. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right which is essential to preserve legality in a democratic society.[9] That right, which constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty[10] and to all situations of deprivation of liberty, including not only to detention for the purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities and migration detention.[11] It applies irrespective of the place of detention or the legal terminology used in the legislation, and furthermore, any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[12]

89. The Working Group wishes to underline that although the Government argues that throughout the relevant period the detention of Mr. Abdulhussein has been reviewed 71 times by the Case Management and Detention Review Committee, as the Working Group has already clearly stated in its previous opinions,[13] this Committee is not a judicial body as required by article 9 (4) of the Covenant. The Working Group observes the repeated failure to explain how the reviews carried out by this Committee satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the Covenant.[14] The Working Group therefore finds that Mr. Abdulhussein's right to challenge the legality of his detention before a judicial body, the right stipulated in article 9 (4) of the Covenant, has been violated. In making this finding, the Working Group also recalls the numerous findings by the Human Rights Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 of the Covenant.[15]

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[8] A/HRC/39/45, annex, para. 12.

[9] See paras. 2–3.

[10] Ibid., para. 11.

[11] Ibid., para. 47 (a).

[12] Ibid., para. 47 (b).

[13] Opinions No. 20/2018, para. 61; No. 50/2018, para. 77; No. 74/2018, para. 103; No. 1/2019, para. 80; No. 2/2019, para. 95; and No. 74/2019, para. 67.

[14] Ibid.

[15] *C. v. Australia*; *Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

90. Moreover, the Working Group observes that at present, the detention of Mr. Abdulhussein appears to be indefinite. He has been in detention since 15 December 2012, and the Working Group is mindful that the Government in its response has failed to give an indication as to when this detention might come to an end or what steps it is taking or intends to take to bring it to an end.

91. The Working Group therefore must address the argument presented by the Government that the continuing detention in the context of migration is lawful under international law so long as the grounds for detention are justifiable, and that the length of detention is not a determining factor.[16] The Working Group considers this to be a misinterpretation of the applicable international human rights law. The Working Group wishes to underline that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,[17] which is why it has required that a maximum period for detention in the course of migration proceedings be set, by legislation, and that upon expiry of the period for detention set by law, the detained person must be automatically released.[18]

92. The Working Group disagrees with the Government's submission that the length of detention in itself is not a determining factor and that so long as reasons justifying detention are present, the detention may legally continue. To follow this reasoning would mean to accept that individuals could be caught up in an endless cycle of periodic reviews of their detention without any prospect of actual release. This situation is akin to indefinite detention which cannot be remedied even by the most meaningful review of detention carried out on an ongoing basis.[19] As stated in revised deliberation No. 5:

> There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them – including non-cooperation of the consular representation of the country of origin, the principle of non-refoulement[20] or the unavailability of means of transportation – thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.[21]

93. The Working Group considers that the de facto indefinite detention of Mr. Abdulhussein is contrary to the obligations that Australia has undertaken under international law and to article 9 of the Covenant in particular. The Working Group therefore concludes that Mr. Abdulhussein has been denied the right to challenge the continued legality of his detention, in breach of article 9 of the Covenant, and that his detention is arbitrary, falling under category IV.

94. Furthermore, the Working Group notes the source's argument that Mr. Abdulhussein as a non-citizen appears to be in a different situation from Australian citizens in relation to his ability to challenge effectively the legality of his detention before domestic courts and tribunals, owing to the effective result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. The Government denies those allegations, arguing that in the cited case the High Court held that provisions of the Migration Act requiring detention of non-citizens until they were removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

95. The Working Group notes that the same explanation was provided by the Government in relation to the High Court's decision in that case, and that this is the same explanation which the Government has repeatedly presented to the Working Group and which has been rejected by the Working Group on previous occasions.[22] This explanation

[16] Opinion No. 74/2019, paras. 69–70.

[17] See the Working Group's revised deliberation No. 5 (A/HRC/39/45, annex), para. 18, and opinions Nos. 28/2017, 42/2017 and 7/2019; see also A/HRC/13/30, para. 63.

[18] Revised deliberation No. 5, para. 17. See also A/HRC/13/30, para. 61; and opinion No. 7/2019.

[19] Opinions Nos. 1/2019 and 7/2019.

[20] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; Convention relating to the Status of Refugees, art. 33.

[21] A/HRC/13/30, para. 63; opinion No. 45/2006; A/HRC/7/4, para. 48; and A/HRC/10/21, para. 82.

[22] Opinions No. 21/2018, para. 79; No. 50/2018, para. 81; No. 74/2018, para. 117; No. 1/2019, para. 88; No. 2/2019, para. 98; and No. 74/2019, para. 72.

only confirms that the High Court affirmed the legality of the detention of non-citizens until they were removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future.

96. The Working Group has previously noted that the Government does not explain how such non-citizens can challenge effectively their continued detention after this decision of the High Court, which is what the Government should show in order to comply with articles 9 and 26 of the Covenant. The Working Group recalls the jurisprudence of the Human Rights Committee in which it examined the implications of the High Court's judgment in *Al-Kateb v. Godwin* and concluded that the effect of that judgment was such that there was no effective remedy to challenge the legality of continued administrative detention.[23]

97. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[24] and this remains the position of the Working Group in the present case. The Working Group underlines that this situation is discriminatory and contrary to article 26 of the Covenant. It therefore concludes that the detention of Mr. Abdulhussein is arbitrary, falling under category V.

Migration Act 1958

98. The Working Group observes that the present case is the latest in a number of cases from Australia that have come before it since 2017 which have concerned the same issue, namely mandatory immigration detention as per the Migration Act 1958.[25] This Act stipulates that an unlawful non-citizen must be detained, and kept in immigration detention until removed from Australia or granted a visa. In addition, section 196 (3) of the Act provides that "to avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1) (a), (aa) or (b)) unless the non-citizen has been granted a visa". As such, providing there is some sort of process relating to the granting of a visa, or to removal (even if removal is not reasonably practicable in the foreseeable future), the detention of an unlawful non-citizen is permitted under Australian law.

99. The Working Group reiterates that seeking asylum is not a criminal act but a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights, and in the Convention relating to the Status of Refugees, of 1951, and its 1967 Protocol.[26] The Working Group notes that these instruments constitute international legal obligations undertaken by Australia, and in particular notes the legally binding nature of the 1951 Convention and its 1967 Protocol in relation to Australia.

100. The Working Group wishes to underline that deprivation of liberty in the immigration context must be a measure of last resort and alternatives to detention must be sought in order to meet the requirement of proportionality.[27] Moreover, as the Human Rights Committee has stated in paragraph 18 of its general comment No. 35 (2014) on liberty and security of person:

> Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

[23] *C. v. Australia*; *Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), para. 9.3.

[24] Opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019 and No. 74/2019.

[25] Ibid.

[26] Opinions Nos. 28/2017, 42/2017 and 50/2018; see also revised deliberation No. 5, para. 9.

[27] A/HRC/10/21, para. 67. See also revised deliberation No. 5, paras. 12 and 16.

101. The provisions of the Migration Act 1958 stand at odds with these requirements of international law, as section 189 (1) (and (3)) of the Act provide for de facto mandatory detention of all unlawful non-citizens unless they are being removed from the country or are granted a visa. The Working Group further observes that the Act does not reflect the principle of exceptionality of detention in the context of migration as recognized in international law, and nor does it provide for alternatives to detention to meet the requirement of proportionality.[28]

102. The Working Group is concerned about the number of cases from Australia regarding the implementation of this Act. The Working Group is equally concerned that, in all these cases, the Government has argued that the detention is lawful because it follows the stipulations of the Migration Act 1958. The Working Group wishes to clarify that such argument cannot be accepted as legitimate under international law. The fact that a State is following its own domestic legislation does not in itself approve that legislation as conforming with the obligations that the State has undertaken under international law. In the Working Group's view, no State can legitimately avoid its obligations arising from international law by evoking its domestic laws and regulations.

103. The Working Group therefore wishes to emphasize that it is the duty of the Government to bring its national legislation, including the Migration Act 1958, into line with its obligations under international law. Since 2017, the Government has been consistently reminded of these obligations by numerous international human rights bodies, including the Human Rights Committee,[29] the Committee on Economic, Social and Cultural Rights,[30] the Committee on the Elimination of Discrimination against Women[31] and the Committee on the Elimination of Racial Discrimination,[32] as well as by the Special Rapporteur on the human rights of migrants[33] and by the Working Group.[34] The Working Group therefore calls upon the Government to review this legislation in the light of its obligations under international law, without delay. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

104. The Working Group notes the spread of the coronavirus disease (COVID-19) pandemic, which has required many countries around the world to take unprecedented steps. The World Health Organization has identified people deprived of their liberty, such as prisoners and individuals in other places of deprivation of liberty, including those in immigration detention, as being more vulnerable to COVID-19 than the general population because of the confined conditions in which they live in very close proximity to each other over prolonged periods of time.[35] Numerous United Nations bodies have called upon all States to release detainees, in particular those in immigration detention.[36] The Working

[28] Ibid.

[29] CCPR/C/AUS/CO/6, paras. 33–38.

[30] E/C.12/AUS/CO/5, paras. 17–18.

[31] CEDAW/C/AUS/CO/8, para. 53.

[32] CERD/C/AUS/CO/18-20, paras. 29–33.

[33] See A/HRC/35/25/Add.3.

[34] Opinions No. 50/2018, paras. 86–89; No. 74/2018, paras. 99–103; No. 1/2019, paras. 92–97; No. 2/2019, paras. 115–117; and No. 74/2019, paras. 37–42.

[35] WHO Regional Office for Europe, "Preparedness, prevention and control of COVID-19 in prisons and other places of detention: interim guidance", 15 March 2020, p. 1.

[36] See, for example, the statement of the United Nations High Commissioner for Human Rights on 25 March 2020 – Urgent action needed to prevent COVID-19 "rampaging through places of detention"; the advice of the Subcommittee on Prevention of Torture to States parties and national preventive mechanisms, relating to the coronavirus pandemic, adopted on 25 March 2020; WHO Regional Office for Europe, "Preparedness, prevention and control of COVID-19 in prisons and other places of detention: interim guidance", 15 March 2020; the advice of the Subcommittee on Prevention of Torture to the national preventive mechanism of the United Kingdom of Great Britain and Northern Ireland regarding compulsory quarantine for coronavirus, adopted at its fortieth session (10–14 February 2020); and the statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic (CPT/Inf (2020)13), issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 20 March 2020.

Group associates itself with these calls and calls upon the Government of Australia to release those currently held in immigration detention.

105. The Working Group welcomes the invitation of 27 March 2019 from the Government for the Working Group to conduct a visit to Australia in 2020. Although the visit had to be postponed due to the worldwide pandemic, the Working Group looks forward to carrying out the visit as soon as practically possible. It views the visit as an opportunity to engage with the Government constructively and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

Disposition

106. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Jamal Talib Abdulhussein, being in contravention of articles 2, 3, 7, 8 and 9 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories IV and V.

107. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Abdulhussein without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

108. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Abdulhussein immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Abdulhussein.

109. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Abdulhussein and to take appropriate measures against those responsible for the violation of his rights.

110. The Working Group requests the Government to bring its laws, particularly the Migration Act 1958, into conformity with the recommendations made in the present opinion and with the international law commitments made by Australia.

111. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

112. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

113. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Abdulhussein has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Abdulhussein;

(c) Whether an investigation has been conducted into the violation of Mr. Abdulhussein’s rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Australia with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

114. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and

whether further technical assistance is required, for example through a visit by the Working Group.

115. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

116. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[37]

[*Adopted on 1 May 2020*]

[37] Human Rights Council resolution 42/22, paras. 3 and 7.

Annex

Individual opinion of José Guevara Bermúdez and Seong-Phil Hong (partially dissenting)

1. We would like to express our dissenting view with regard to the conclusion related to category I in the present case concerning Jamal Talib Abdulhussein. We consider that the detention of Mr. Abdulhussein should have been considered as arbitrary under category I, as it is impossible to invoke a legal basis justifying his deprivation of liberty, in violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1), (3) and (4) of the Covenant.

2. The Working Group has established a consistent practice of finding that a detention pursuant to a law that is inconsistent with international human rights law does not satisfy the exigencies of the principle of legality and thus the deprivation of liberty lacking in legal basis is arbitrary under category I of its methods of work. Such practice can be seen, for example, in opinions No. 4/2019, para. 49 (detention under lese majesty criminal provisions); No. 69/2018, para. 21; No. 40/2018, para. 45; No. 43/2017, para. 34 (detention pursuant to a law that criminalized conscientious objection to military service); No. 1/2018, paras. 60 and 65 (detention under the Constitution and a law that provides for automatic pretrial detention for certain crimes); and No. 14/2017 (detention pursuant to a law that criminalized consensual same-sex relations between adults).

3. In the present opinion, the Working Group presented an analysis of the compatibility of the Migration Act of 1958 with the international obligations of Australia, including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the Convention relating to the Status of Refugees, of 1951, and its 1967 Protocol, outside of the sections of the opinion related to the discussion of five legal categories that could be applied to the detention of Mr. Abdulhussein.

4. In that regard, the Working Group found that the Migration Act 1958 per se manifestly contravened international law, as it provided for the mandatory detention of all unauthorized non-citizens (unless they were being removed from the country or granted a visa), failed to respect the principle of exceptionality of detention in the context of migration, and provided no alternatives to detention. In view of the foregoing, the Working Group urged the Government of Australia to bring the Migration Act 1958 into conformity with its international law obligations, and reiterated the relevant recommendations by numerous international human rights bodies, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women and the Committee on the Elimination of Racial Discrimination, as well as by the Special Rapporteur on the human rights of migrants and by the Working Group.

5. We consider that such analysis should have been included in the section related to the consideration of the situation under category I, and that the Working Group should have concluded that the Migration Act 1958, as such, could not be considered as valid under international law, and found that the detention of Jamal Talib Abdulhussein fell under category I.